OVERVIEW OF PROHIBITED PERSONNEL PRACTICES

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I. OSC'S RESPONSIBILITIES

A. Protect Against Prohibited Personnel Practices. OSC receives and investigates allegations from federal employees, former employees and job applicants concerning prohibited personnel practices (PPPs) and other activities prohibited by civil service law, rule, or regulation; and, if warranted, initiates complaints for corrective or disciplinary action before the Merit Systems Protection Board (MSPB).

B. Channel For Blowing The Whistle. OSC provides a secure channel through which information evidencing a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety may be disclosed without fear of retaliation.

C. Enforcement Of The Hatch Act. OSC enforces and provides advice concerning the Hatch Act, which governs the permissible scope of partisan political activity of government employees.

D. Enforcement Of The Uniformed Services Employment And Reemployment Rights Act (USERRA) Of 1994. OSC receives and investigates allegations of discrimination based on an affiliation with the uniformed services or allegations of denial of reemployment rights granted to members of the uniformed services; and, if warranted, may initiate a complaint for corrective action before the MSPB.

E. Violation of Civil Service Law. OSC investigates allegations concerning activities prohibited by civil service, law, rule or regulation, and, the arbitrary or capricious withholding of information available under the Freedom of Information Act.

II. PROTECT AGAINST PROHIBITED PERSONNEL PRACTICES

A. 5 U.S.C. § 2302(b)

Under this section, employees who possess authority to take, direct others to take, recommend or approve any personnel action, commit PPPs, if they engage in any of the following conduct:

1. **Discrimination**. Discriminate based on race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. It was not intended that OSC duplicate or bypass the procedures established in agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is OSC's general policy, as set forth at 5 C.F.R. § 1810.1, to defer allegations of discrimination to the EEO process, where possible. 5 U.S.C. § 2302(b)(1).

2. Improper consideration of recommendations. Solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of an evaluation of work qualifications and performance and an evaluation of the character, loyalty, or suitability of such individual. This is intended to prevent the use of political influence to obtain a position. 5 U.S.C. § 2302(b)(2).

3. **Political coercion**. Coerce the political activity of any person or take reprisals for a refusal to engage in such activity. 5 U.S.C. § 2302(b)(3).

4. **Obstruction of right to compete**. Deceive or willfully obstruct any person from competing for employment. 5 U.S.C. § 2302(b)(4).

5. **Influence withdrawal from competition**. Influence any person to withdraw from competition for any position to improve or injure the employment prospects of any other person. 5 U.S.C. § 2302(b)(5).

6. **Grant an unauthorized advantage**. Grant an unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant. 5 U.S.C. § 2302(b)(6).

7. **Nepotism**. Appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative of such employee if the position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as such an official. 5 U.S.C. § 2302(b)(7).

> **a.** A "relative" means a "a father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother or half sister." 5 U.S.C. § 3110(a)(3).

b. A "public official" means an employee in whom is vested the authority by law, rule or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals, or to recommend individuals for appointment, employment, promotion, or advancement, in connection with employment in an agency." 5 U.S.C. § 3110(a)(2).

8. Personnel action taken because of whistleblowing. Take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, or specifically required by Executive Order to be kept secret. 5 U.S.C. § 2302(b)(8).

9. Personnel action taken because of exercise of rights. Take or fail to take, or threaten to take or fail to take a personnel action against any employee because of (1) the exercise of an appeal, complaint, or grievance right granted by any law, rule, or regulation; (2) for testifying or for otherwise lawfully assisting any individual in the exercise of any such right; (3) for cooperating with or disclosing information to the Inspector General of any agency, or the Special Counsel; or (4) for refusing to obey an order that would require the individual to violate the law. 5 U.S.C. § 2302(b)(9).

10. **Discrimination based on non-performance related conduct**. Discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. 5 U.S.C. § 2302(b)(10). This includes discrimination based upon sexual orientation.

11. Violation of law, rule or regulation. Take or fail to take any other personnel action if taking or failing to take such action violates any law, rule, or regulation implementing or directly concerning merit systems principles. 5 U.S.C. § 2302(b)(11).

B. Jurisdictional Requirements Of Section 2302

. In general, the protections against prohibited personnel practices extend to federal job applicants, employees or former employees in any agency of the Executive Branch or the Government Printing Office.

1. **Exception**: By and large, Section 2302 does not apply to applicants or

employees of governmental corporations, intelligence agencies, the General Accounting Office, the U.S. Postal Service, the Postal Rate Commission or the Federal Bureau of Investigation. However, Section 2302(b)(8) applies to applicants or employees of governmental corporations as set forth in 31 U.S.C. § 9101 (including Amtrak, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, and the Resolution Trust Corporation).

2. **Exception**: Section 2302's protections do not extend to any position which, prior to an illegal personnel action, was excepted from the competitive service because of its confidential, policy-determining, policy-making or policy advocating character or which the President has excluded from coverage.

C. Definition of Personnel Action

1. appointment;
2. promotion;
3. adverse action covered by chapter 75 or other disciplinary or corrective action;
4. detail, transfer, or reassignment;
5. reinstatement;
6. reemployment;
7. performance evaluation under chapter 43;
8. decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to a personnel action;
9. an order to undergo a psychiatric test or examination;
10. any other significant change in duties, responsibilities, or working conditions.

Note: A recommendation of a personnel action normally has the same legal effect as actually taking or failing to take the action, for example, a retaliatory recommendation of a personnel action is normally treated the same as taking the action. However, it appears that disciplinary action will not be ordered against an official whose recommendation was not reasonably likely to produce the recommended action. See Special Counsel v. Spears, 75 M.S.P.R. 639 (1997); Frederick v. Dept. Of Justice, F.3d 349 (Fed. Cir. 1996); Eidmann v. Merit Systems Protection Board, 976 F.2d 1400 (Fed. Cir. 1992); Caster v. Dept. of Army, 62 M.S.P.R. 436, 442-43 (1994); Sullivan v. Navy, 720 F.2d 1266 (Fed. Cir. 1988).

D. Prohibition Against Threatened Personnel Actions

Threats to take or fail to take personnel actions are prohibited under 5 U.S.C. § 2302(b)(8) (protecting whistleblowing) and (b)(9) (protecting the exercise of various rights).

1. Congress intended a broad interpretation of "threaten." Gergick v. General Services Administration, 43 M.S.P.R. 651, 656 (1990).

2. The test for a threat is objective: do the facts show that the challenged conduct constitutes a threatened personnel action under the totality of the facts and circumstances? The existence of a threat may be inferred from circumstantial evidence.

3. A generalized, subjective fear by the employee of future harassment, unsupported by reference to any specific matter, does not constitute a threatened personnel action. Godfrey v. Dept. of Air Force, 45 M.S.P.R. 298, 303 (1990).

4. A statement advising employees that if they did not tell the truth they could be subjected to discipline or a personal lawsuit does not constitute a threat. Garst v. Dept. of Army, 56 M.S.P.R. 371, 379-80 (1993).

5. Being yelled at by supervisor and told to "go find another job" does not, without more, constitute a threatened removal. Shivaee v. Dept. of Navy, 74 M.S.P.R. 383 (1997).

6. Placement on a performance improvement period (PIP) involves a threatened personnel action, *i.e.*, a reduction in grade or removal, and therefore is a personnel action. Gonzales, 64 M.S.P.R. 314.

7. A notice of further investigation containing a statement of facts already gathered, a preliminary conclusion of apparent misconduct and a warning of possible disciplinary action is sufficient to constitute a threat of personnel action. But a mere threat to undertake an inquiry or investigation may not constitute threat of personnel action. Gergick v. General Services Administration, 49 M.S.P.R. 384, 392 (1991).

E. Election Of Remedies

Only employees covered by a collective bargaining agreement must make an election among potential venues for pursuing claims of PPPs. Three venues are available: (1) an adverse action appeal to the Board under 5 U.S.C. § 7701; (2) an action through a negotiated grievance proceeding; or (3) an appeal through the OSC complaint/individual right of action (IRA) procedure. An election by a bargaining unit employee to pursue one of these venues precludes resort to the other two. An election occurs upon filing a timely notice of appeal with MSPB,

filing of a timely grievance or by alleging a prohibited personnel practice to OSC. 5 U.S.C. § 7121(g).

F. Stays Of Personnel Actions

1. OSC may request any member of the Board to stay a personnel action whenever OSC reasonably believes that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. 5 U.S.C. § 1214(b)(1)(A)(I);
5 C.F.R. § 1210.127.

2. The initial stay shall be granted for 45 days unless the Board member determines from the facts and circumstances involved that a stay would not be appropriate. Special Counsel v. Federal Emergency Management Agency, 43 M.S.P.R. 527, 529-30 (1990); 5 U.S.C. § 1214(b)(1)(A)(ii); 5 C.F.R. 1201.127(c)(1). The agency is not entitled to respond to the initial stay request. 5 U.S.C. § 1214(b)(1)(C).

3. At OSC's request, the Board may extend the initial stay for any period the Board determines appropriate, after first providing the agency with an opportunity to comment on the request for extension. 5 U.S.C. §§ 1214(b)(1)(B) and (C); 5 C.F.R. 1201.127(c)(2).

4. A stay order will preserve or restore the status quo, but will not provide retroactive relief, for example, back pay.

G. Anti-Harassment Order

OSC may request from MSPB any order which may be necessary to protect a witness or other individual from harassment during the pendency of an OSC investigation. 5 U.S.C. § 1204(e)(1)(B)(I).

H. Corrective Action

1. General rule. Under 5 U.S.C. §§ 1214(g)(1) and (2), the MSPB may grant the following corrective action upon finding a PPP:

> **a.** Place the harmed individual "as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred"; and
>
> **b.** reimburse the harmed individual "for attorney fees, back pay and related benefits, medical costs incurred, travel expenses, and any other

reasonable and foreseeable consequential damages."

2. Costs. Although section 1214(g)(2) only mentions the recovery of medical costs and travel expenses, the prevailing employee may recover other costs attributable to PPPs as "consequential damages." While those terms are somewhat vague, they are generally understood to mean damages that do not flow directly from a wrong, but rather from the consequences or results of the wrong.

3. Transfer Preference. If the Board finds a PPP under 5 U.S.C. § 2302(b)(8), the head of an agency may grant a preference to the affected employee to transfer to a position of the same status and tenure pursuant to 5 U.S.C. § 3352. The employee exercises his statutory right of preference by applying to transfer to any similar position within his own agency or any other executive agency. 5 U.S.C. § 3352(b).

I. Disciplinary Action

1. OSC is authorized to file complaints for disciplinary action against an employee for committing a prohibited personnel practice. 5 U.S.C. § 1215.

2. The charged official is entitled to: (1) an opportunity to respond to the complaint; (2) legal or other representation; (3) a hearing and a transcript kept of the hearing; and (4) a written decision.

3. Exception: OSC is not authorized to file with MSPB a complaint for disciplinary action against an employee who is appointed by the President, by and with the advice and consent of the Senate, to a confidential, policy-making, policy determining, or policy-advocating position. Rather, OSC must present such a complaint to the President. 5 U.S.C. § 1215(b). Likewise, OSC is not authorized to file for disciplinary action against a member of the uniformed services or a government contractor, but may transmit a recommendation for disciplinary or other appropriate action to the head of the agency concerned. 5 U.S.C. § 1215(c)(1).

4. During an OSC investigation, agencies may not take disciplinary action based on the matters under investigation without OSC's approval. 5 U.S.C. § 1214(f).

III. HATCH ACT ENFORCEMENT

A. Amendments to the Hatch Act in 1993 relaxed many past restrictions on political activity by federal employees and state employees who work in connection with federal funds. Despite this relaxation, federal employees are still precluded from using their official authority to influence an election; from soliciting, receiving or accepting political contributions; from running for partisan office; or, from influencing political activity by any person who has business with the employee's office. In addition, federal employees may not engage in political activity while on duty, while in a government car or office or while wearing insignia identifying the office or position of the employee.

B. The broad, pre-1993 prohibitions against taking an active part in political management or in political campaigns have not been lifted for career members of the Senior Executive Service, Administrative Law Judges, members of the Contracts Appeals Board or employees of certain federal entities which Congress excluded from the 1993 Amendments, for example, OSC, MSPB and various law enforcement and intelligence entities.

C. OSC will furnish advisory opinions regarding whether specific political activity an employee wishes to undertake violates the law.

IV. USERRA ENFORCEMENT

An individual may complain to the Department of Labor (DOL) alleging either discrimination based on an affiliation with the uniformed services or denial of reemployment rights granted to members of the uniformed services. If DOL does not resolve the complaint, the complainant may file an appeal with the MSPB or request that DOL refer the matter to OSC. In the event of a referral, OSC may file a complaint with MSPB, if it is satisfied that the complainant is entitled to the rights or benefits sought. If OSC declines to take action, the complainant may file an appeal with MSPB.

V. OSC PROCEDURES

A. The Initial Investigation - Complaints Examining Unit.

1. The Complaints Examining Unit (CEU) is comprised of attorneys and personnel management specialists who conduct the initial investigation of PPP allegations and certain other violations of law, rule or regulation.

2. The initial investigation consists of the review of all materials submitted by the complainant, and may include other steps such as making contact with potential witnesses and obtaining additional relevant documents.

3. If factual issues cannot be resolved or if there is sufficient evidence uncovered during the initial investigation to suggest a possible violation within OSC's jurisdiction, the matter is referred to OSC's Investigation Division for a full field investigation.

B. The Full Field Investigation - Investigation And Prosecution.

1. Full field investigations of matters referred by CEU are conducted by the investigators in OSC's Investigation Division. These investigations ordinarily entail travel by the OSC investigator to the site in question for in-person interviews of the complainant and other witnesses, and the inspection of documents and other evidence. Upon completion of the investigation, a report of investigation is prepared.

2. The evidence gathered and report prepared by the investigator are analyzed by the attorneys in the Prosecution Division to determine whether there is sufficient evidence for OSC to prosecute a case before MSPB for purposes of corrective and disciplinary action.

3. If sufficient evidence exists to prosecute a corrective action case, OSC must first report the matter to the agency, the Board and the Office of Personnel Management. If after a reasonable period of time, the agency does not act to correct the alleged prohibited personnel practice, OSC may file a corrective action petition. 5 U.S.C. § 1214(b)(2)(B). OSC is not required to prepare a report to the agency prior to filing a disciplinary action petition.

C. How OSC Approaches Cases.

1. Negotiation stressed. OSC achieves most corrective action by helping complainants and their agencies reach mutually agreeable resolutions of their differences. Where a mutually agreeable resolution is not possible, however, OSC will prosecute complaints in which an impartial investigation reveals that a prohibited personnel practice has been committed.

2. Disciplinary action. In appropriate cases, where an impartial investigation reveals the commission of a prohibited personnel practice, OSC may request that an agency impose disciplinary action against the responsible official(s), or may file its own petition with the Merit Systems Protection Board, requesting the imposition of discipline.

3. Interdivisional teamwork. From the onset of each field investigation, an attorney and an investigator are jointly assigned to a case. They are responsible for planning case strategy, assessing evidence and pursuing a negotiated settlement whenever possible. If an action is filed with the MSPB, the investigator plays an integral part in the litigation effort.

D. Statutory Requirements Concerning The Handling Of Cases.

1. Limits on disclosure of information. OSC is prohibited from responding to any inquiry or disclosing any information about the complainant, except in carefully prescribed circumstances. 5 U.S.C. § 1212(g).

2. Time limits. No later than 240 days after the date of receipt of a PPP allegation, OSC must make a determination whether there are reasonable grounds to believe that a PPP has occurred or is to be taken. If OSC is unable to make that determination within the 240-day period, the complainant may agree to an extension of time. If the complainant does so, the determination then must be made within the agreed time. 5 U.S.C. § 1214(b)(2)(A).

3. Pretermination status reports. No later than 10 days before OSC closes a PPP investigation, OSC must advise the complainant in writing of its proposed findings of fact and legal conclusions. The complainant may submit written comments to OSC. In a closure letter explaining its findings, OSC must respond to any written comments submitted by the complainant.

E. Agency Responsibilities

1. Although OSC possesses subpoena power, exercise of that power against federal agencies is obviated by Civil Service Rule 5.4, which requires agencies to make available to OSC their employees for giving testimony and to furnish all documents or materials related to OSC's investigation. Moreover, employees are performing official duty when giving testimony or furnishing evidence.

2. Agency and government corporation heads are responsible for ensuring that all their employees are informed of the rights and remedies available to them under the Whistleblower Protection Act (WPA) of 1989.

3. Compliance with merit systems principles must be a factor in performance appraisals for Senior Executive Service (SES) employees.

VI. VIOLATIONS OF SECTION 2302(b)(8)

A. Whistleblower Protection Act (WPA) Of 1989

Congress enacted the WPA in order to strengthen and improve the protections for whistleblowers already contained in the original version of 5 U.S.C. §§ 2302(b)(8) and (9). Marren v. Dept. of Justice, 51 M.S.P.R. 632, 636 (1991), aff'd., 980 F.2d 745 (Fed. Cir. 1993) (Table). Congress intended to send "a strong, clear signal to whistleblowers that Congress intends that they be protected from retaliation related to their whistleblowing." Marano v. Dept. of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

1. Statutory Provision. Under (b)(8), as modified by the WPA, it is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, or specifically required by Executive Order to be kept secret. 5 U.S.C. § 2302(b)(8).

2. Elements. To establish a (b)(8) violation, OSC must show by preponderant evidence:

a. A disclosure of information protected by section (b)(8);

b. A personnel action;
c. Knowledge of the protected disclosure; and
d. The protected disclosure was a contributing factor in the personnel action.

B. Requirements for Whistleblowing

1. Disclosure

a. "To `disclose' is `to expose; to make known; to lay bare; to reveal.'" Horton v Dept. of Navy, 60 M.S.P.R. 397, 402 (1994), affirmed, 66 F.3d 279 (Fed. Cir 1995). A disclosure does not need to be made in a particular form to be protected. The specific label given to a disclosure does not determine whether the disclosure is protected. Garrett v. Dept. of Defense, 62 M.S.P.R. 666, 671 (1994); Williams v. N.L.R.B., 59 M.S.P.R. 640, 645 (1993).

b. Expressing an opinion may rise to the level of a protected disclosure. White v Dept. of Air Force, 63 M.S.P.R. 90, 96-7 (1994) (MSPB finds protected an opinion that new agency policy is unworkable and untenable).

2. Content of disclosure

a. Gross waste of funds is "more than a debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." Nafus v. Dept. of Army, 57 M.S.P.R. 386, 393 (1993).

b. Gross mismanagement is "more than de minimis wrongdoing or negligence . . . [It] means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." Nafus, 57 M.S.P.R. at 395. This does not include management decisions which are merely debatable. There must be an element of blatancy. Carolyn v. Dept. of Interior, 63 M.S.P.R. 684, 691 (1994), review dismissed, 43 F.3d 1485 (Fed. Cir. 1994) (Table); see also Sazinski v. H.U.D., 73 M.S.P.R. 682, 686-687 (1997) (letter disagreeing with agency's decision to abolish employee's position was not protected).

c. Unlike gross mismanagement and gross waste of funds, there is no *de*

minimis exception for disclosures concerning abuse of authority or violations of law, rule or regulation. Horton v. Dept. of Navy, 66 F.3d 279 (Fed. Cir. 1995); Berkley v. Dept. of Army, 71 M.S.P.R. 341, 352 (1996); D'Elia, 60 M.S.P.R. at 233. But see Frederick v. Dept.of Justice, 73 F.3d 349 (Fed. Cir. 1996) (finding trivial violations not protected).

d. Abuse of authority is "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." D'Elia v. Dept.of Treasury, 60 M.S.P.R. 226 (1993) citing 5 C.F.R. 1250.3(f) (1988).

e. A substantial and specific danger to public health and safety has been construed to encompass dangers to a specific class of individuals, even if the public at large is not endangered. See Wojcicicki v. Dept. of Air Force, 72 M.S.P.R. 628, 633-35 (1996) (MSPB finds protected a disclosure regarding safety hazards to workers involved in sandblasting); Owen v. Dept. of Air Force, 63 M.S.P.R. 621, 628-30 (1994) (MSPB finds protected a disclosure that fumes detrimentally affected respiratory condition); Braga v. Dept. of Army, 54 M.S.P.R. 392, 398 (1992), aff'd, 6 F.3d 787 (Fed. Cir. 1993) (Table) (MSPB finds protected an allegation that protective clothing was insufficient to protect soldiers); Gady v. Dept. of Navy, 38 M.S.P.R. 118, 121 (1988) (MSPB finds protected an objection to policy permitting smoking in library).

3. Reasonable Belief

a. "[T]he employee must only have a reasonable belief that his/her disclosure is true in order for a disclosure to be protected; the actual veracity of any disclosure, in theory, does not affect whether a disclosure is protected," and "it is inappropriate for disclosures to be protected only if they are made for certain purposes . . . ." S. Rep. No. 413, 100th Cong., 2d Sess. 12-13 (1988).

b. In assessing the reasonableness of the discloser's belief, the Board employs an objective test: given the information available to the whistleblower, could a person standing in his shoes reasonably believe that the disclosed information evidences one of the identified conditions in the statute? Gores v. Dept. of Veterans Affairs, 68 M.S.P.R. 100 (1995);

Frederick v. Dept. of Justice, 65 M.S.P.R. 517, 530-531 (1994), rev'g Nafus v. Dept. of Army, 57 M.S.P.R. 386, 398-399 (1993) (requiring genuine belief), rev'd on other grounds Frederick v. Dept. of Justice, 73 F.3d 349 (Fed. Cir. 1996). But see Ward v. Dept. of Army, 67 M.S.P.R. 482, 485-486 (1995) (using interchangeably "would believe" and "would not be unreasonable to conclude"); D'Elia v. Dept. of Treasury, 65 M.S.P.R. 540, 547 (1994) (using "would have believed"); O'Shea v. Dept. of Transportation, 65 M.S.P.R. 512, 516 (1994) (using "would have believed"). Cf. Nafus, 57 M.S.P.R. at 397 (using "could have"), citing Ramos v, v. F.A.A., 4 M.S.P.R. 388, 392 n.1 (1980) (using "would have").

c. Focus is on perception of whistleblower. The focus of a reasonable belief inquiry is on the perception of the whistleblower. Frederick v. Dept. of Justice, 65 M.S.P.R. at 531, rev'd on other grounds Frederick v. Dept. of Justice, 73 F.3d 349 (Fed. Cir. 1996).

4. Personal Motivation

"[Section 2302(b)(8)] makes no provision . . . for considering whether the employee's personal motivation rendered his belief not genuine." Frederick v. Dept. of Justice, 65 M.S.P.R. at 531, rev'd on other grounds 73 F.3d 349 (Fed. Cir. 1996); see also Horton, 66 F.3d 279. Thus, a whistleblower's personal motivation to blow the whistle does not per se affect the reasonableness of his disclosure. Carter v. Dept. of Army, 62 M.S.P.R. 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995) (Table); see also Williams v. Dept. of Defense, 46 M.S.P.R. 549, 553 n.5 (1991) (post-WPA decision recognizing that personal motivation is "irrelevant" to whether disclosure is protected).

5. No Prescribed Channels For Whistleblowing

a. A whistleblower may disclose information to "any" person. There is no requirement that the whistleblowing occur through any specific channel (*e.g.*, Office of Inspector General or OSC), unless the information concerns matters required by law or Presidential order to be kept confidential. 5 U.S.C. § 2302(b)(8). "[I]t is inappropriate for disclosures to be protected only if they are made . . . to certain employees or only if the employee is the first to raise the issue." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988).

b. Exception: The Federal Circuit held that a disclosure made directly to the wrongdoer is not protected because it was not made to

someone in a position to act to remedy the problems revealed by the disclosure. Horton v. Dept. of Navy, 66 F.3d 279 (Fed. Cir. 1995); Willis v. Dept. of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998). Willis also indicates that a disclosure made in the performance of an employee's required duties would normally not be protected by (b)(8).

6. Disclosures Made Under Grievance or Appeal Procedures

a. A disclosure that would otherwise fall within the protections of (b)(8) is not protected under that provision, if the disclosure was made as part of the exercise of an appeal right protected by (b)(9), for example, during a grievance or EEO complaint. In that case, the disclosure is only entitled to the protections of (b)(9). Spruill v. Merit Systems Protection Board, 978 F.2d 679, 690-92 (Fed. Cir. 1992) (EEO complaint); Bump v. Dept. of Interior, 64 M.S.P.R. 326, 352 (1994) (grievance); Wooten v. Dept. of Health and Human Serv., 54 M.S.P.R. 143 (1992) (union official's acting on behalf of members in connection with ULPs and EEO complaints).

b. Exception: Although disclosures made to an Inspector General (IG) are protected by (b)(9), they are also protected by (b)(8), so long as they qualify as whistleblowing. Schlosser v. Dept. of Interior, 75 M.S.P.R. 15 (1997); Paul v. Dept. of Agriculture, 66 M.S.P.R. 643 (1995).

c. If whistleblowing disclosures made during the exercise of an appeal right are reiterated in a separate forum not protected by (b)(9), then the disclosures in the alternative forum are protected by (b)(8). Mitchell v. Dept. of Treasury, 68 M.S.P.R. 504 (1995) ((b)(8) protects disclosures made to news media, although same disclosures made in unfair labor practice complaint); Loyd v. Dept. of Treasury, 69 M.S.P.R. 684 (1996) ((b)(8) protects disclosures made to Congress, although same disclosures made in grievance). However, for reasons not immediately clear, the Board refused to protect disclosures made to the news media, where the disclosures only showed the existence of an unfair labor practice (a violation of the law) and not some other misconduct. Mitchell, 68 M.S.P.R. at 507-10.

7. Mistaken whistleblowers protected

An employee or applicant is protected when the employer mistakenly believes that the

individual is a whistleblower. Smith, 64 M.S.P.R. at 64-65 (1994); Dean, 57 M.S.P.R. at 301; Special Counsel v. Dept. of Navy, 46 M.S.P.R. 274, 278-280 (1990). Such a mistaken belief may obviate the need for proof that a disclosure was reasonable. See Mausser v. Dept. of the Army, 63 M.S.P.R. 41 (1991) (finding employer's perception of employee as potential whistleblower sufficient); Thompson v. Farm Credit Admin., 51 M.S.P.R. 569, 581 (1991); Special Counsel v. Dept. of Navy, 46 M.S.P.R. 274, 280 (1990).

8. Relationship with whistleblower protected

An employer may not base a personnel decision on an employee's relationship with a whistleblower. Di Pompo v. Dept. of Veterans Affairs, 62 M.S.P.R. 44, 48 (1994); Duda v. Dept. of Veterans Affairs, 51 M.S.P.R. 444, 446-47 (1991) (clarifying 5 C.F.R. 1209.2).

9. Disclosures prohibited by law

If an otherwise reasonably based disclosure is prohibited by law (*e.g.*, "Trade Secrets Act"), such disclosure is protected only if made to the Special Counsel or the Inspector General. Kent v. General Services Administration, 56 M.S.P.R. 536, 541 (1993); 5 U.S.C. § 2302(b)(8)(B); 5 C.F.R.' 1209.4(b).

C. Knowledge.

The official responsible for the personnel decision at issue must have knowledge of the disclosure at the time the challenged decision is made. Knowledge may be actual or constructive.

1. Actual knowledge may be demonstrated through circumstantial evidence. Bonggat v. Dept. of Navy, 56 M.S.P.R. 402, 407 (1993); McClelland v. Dept. of Defense, 53 M.S.P.R. 139, 147 (1992).

2. Constructive knowledge is demonstrated by establishing that an official with actual knowledge influenced the deciding official, even though the deciding official lacked actual knowledge. See McClelland, 53 M.S.P.R. at 147.

D. Nexus Between Disclosure And Personnel Action

Prior to the WPA, (b)(8) prohibited reprisals for whistleblowing. The WPA substituted the phrase "because of" for "reprisal" and thus made it unlawful to take, fail to take or threaten personnel actions *because of* whistleblowing. This change reflected congressional criticism of unduly restrictive appellate court decisions which held that proof of reprisal required proof of a retaliatory state of mind. S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988), citing Harvey v. Merit Systems Protection Board, 802 F.2d 537 (D.C. Cir. 1986); Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir. 1986). The “because of” language insured that: "[A] whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action; `Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing.'" Marano, 2 F.3d 1137 (emphasis in text).

1. Contributing factor test governs corrective action cases

a. In corrective action cases, in order to prove a prima facie case that a personnel action has been taken because of whistleblowing, OSC must establish by preponderant evidence that whistleblowing was a "contributing factor" in the challenged personnel action. Caddell v. Dept. of Justice, 52 M.S.P.R. 529, 533 (1992); Rychen v. Dept. of Army, 51 M.S.P.R. 179, 183 (1991); McDaid v. Dept. of Housing and Urban Development, 46 M.S.P.R. 415, 420-21 (1990); 5 U.S.C. §§ 1214(b)(4), 1221(e); 5 C.F.R. 1209.7(a).

b. A contributing factor is "any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of” the personnel action in question. Marano, 2 F.3d at 1140. Personnel actions may be taken for a number of different reasons, "only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the WPA's protection to take effect." Id.

c. The contributing factor test may be satisfied solely by circumstantial evidence. Direct evidence of reprisal is rare. Hathaway, 981 F.2d. at 1242. "Supervisors do not usually write down or tell other employees of

their intent to take prohibited reprisal against an employee." Id. In almost all situations, a nexus between disclosure and challenged action must be inferred. Thompson, 51 M.S.P.R. at 583.

2. Agency's defense in corrective action cases

a. An employer may defend against a prima facie case that an action has been taken because of whistleblowing by proving, with clear and convincing evidence, that it would have taken the same action even in the absence of the disclosure. 5 C.F.R. 1209.7(b). Proof by clear and convincing evidence is, of course, a higher burden than proof by a preponderance. Failure to meet this burden requires the Board to order appropriate corrective action. Marano, 2 F.3d at 1141; Paul, 66 M.S.P.R. 643; Bump, 64 M.S.P.R. at 333; 5 U.S.C. § 1221(e); 5 C.F.R. 1209.7.

b. The clear and convincing evidence standard recognizes the natural litigation advantages enjoyed by the employer in defending any personnel action. McDaid, 46 M.S.P.R. at 421.

c. Where the whistleblower is disciplined for misconduct revealed to the agency through his or her own whistleblowing, the agency may establish its defense to a prima facie case of a violation of (b)(8), without proving that it would have discovered the same misconduct, even in the absence of the whistleblower's disclosures. Rather, it must merely prove that the misconduct, had it been discovered, would have resulted in the same action being taken. Watson v. Dept. of Justice, 64 F.3d 1524 (Fed. Cir. 1995).

d. In determining whether the agency showed that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar action against employees who are not whistleblowers but who are otherwise similarly situated. Geyer v. Department of Justice, 70 M.S.P.R. 682 (1996) (citation omitted).

3. Heightened burden of proof in disciplinary action cases

The MSPB has imposed higher standards on OSC for establishing a violation of section 2302(b)(8) in disciplinary action cases (which are brought against named agency officials, rather than against an agency, as in corrective action cases). In disciplinary cases, the MSPB does not permit OSC to establish a prima facie violation by showing that protected disclosures were a contributing factor in a personnel action. Instead, MSPB requires that OSC show protected disclosures were a "significant factor" in the action. Moreover, rather than place on the agency the burden of proving its defense that it would have taken the same action in the absence of protected conduct, MSPB requires OSC to show by preponderant evidence that, but for the protected activity, the same action would not have been taken. Special Counsel v. Santella and Jech, 65 M.S.P.R. 452, 456-64 (1994).

E. Individual Right of Action.

1. Limited Individual Right of Action (IRA). The WPA permits those who qualify as whistleblowers under 5 U.S.C. § 2302(b)(8) to file an IRA appeal to the MSPB regarding *any* personnel action or threatened personnel action (as defined by statute). 5 U.S.C. § 1221; 5 C.F.R. 1209.1.

2. Limited Cause of Action. The IRA is available only to correct actions taken because of whistleblowing, as prohibited by 5 U.S.C. § 2302(b)(8). Marren, 51 M.S.P.R. at 636-42 (finding no independent jurisdiction in an IRA over handicap discrimination claim and merits of performance rating); 5 U.S.C. § 1221(a); 5 C.F.R. 1209.2(b).

3. Exhaustion of OSC remedy. Before initiating an IRA appeal, an appellant must first request corrective action from OSC. Wardleigh, 50 M.S.P.R. 622; 5 U.S.C. § 1214(a)(3); 5 C.F.R. 1209.5(a). This request must allege an action taken because of whistleblowing. Knollenberg v. Merit Systems Protection Board, 953 F.2d 623, 626 (Fed. Cir. 1992) (denying IRA remedy to appellant who failed to allege action taken because of whistleblowing, even though the personnel action he challenged in his IRA was the same personnel action he challenged in his OSC complaint).

4. Same theory rule. An appellant's OSC complaint will be reviewed by the MSPB to determine whether appellant's IRA is based on the *same disclosure and same theory* as his OSC complaint. The Federal Circuit has disallowed an IRA where the appellant modified his theory of protected disclosure before the Board. Ward, 981 F.2d at 525-26 (finding appellant's recharacterization of disclosure as gross waste of funds before the Board was untimely, and that appellant failed to exhaust administrative remedy with OSC). The basis for determining the substance of appellant's OSC complaint is the statements or submissions made by appellant to

OSC, not appellant's subsequent characterization of his complaint before the Board. Id. at 526.

5. Time for filing IRA. An appellant may file an IRA after one of the following occurs:

a. The appellant receives written notification of OSC's decision to terminate its investigation without action. 5 U.S.C. § 1214(a)(3)(A)(I); 5 C.F.R. 1209.5(a)(1). Caveat: The appellant must initiate his IRA within 65 days from the date OSC issues its written notification. 5 C.F.R. 1209.5(a)(1).

b. The appellant has waited 120 days from the date he first sought corrective action from OSC. 5 U.S.C. § 1214(a)(3)(B); 5 C.F.R. 1209.5(a)(2). However, at appellant's election, the time limitation may be tolled until OSC issues notification of the final results of its investigation.

6. Absence of limitations period. The WPA does not establish time limitations governing when an individual must initiate a complaint with OSC. Therefore, an appellant whose appeal would be untimely under 5 C.F.R. 1201.22 may be able to use the IRA procedure to obtain MSPB review of a personnel action that would otherwise not be appealable because of its untimeliness.

VII. VIOLATIONS OF 5 U.S.C. § 2302(b)(9)

A. Statutory Provision. 5 U.S.C. §§ 2302(b)(9)(A)-(C) makes it a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action against an employee or applicant for employment because of:

1. the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation, e.g., Adair, 65 M.S.P.R. at 164-65 (protecting EEO activity); Leaton v. Dept. of the Interior, 65 M.S.P.R. 331, 341 (1994) (an MSPB appeal is protected); Marable, 52 M.S.P.R. at 630 (grievance and ULP complaints are protected); Crawford v. Dept. of Army, 1 M.S.P.R. 428, 429 (1980) (protecting compensation claim); Parker v. Dept. of Interior, 4 M.S.P.R. 97, 99 (1980) (protecting handicap discrimination suit against agency).

2. testifying for or otherwise lawfully assisting any individual in the exercise of a right referred to above, e.g., Wooten, 54 M.S.P.R. 143 (union official's acting on behalf of members in connection with ULPs and EEO complaints); Viens-Koretko, 53 M.S.P.R. 160 (testifying at co-worker's EEO hearing); Marable, 52 M.S.P.R. 622

(supporting co-worker's EEO complaint).

3. cooperating with or disclosing information to the Inspector General of an agency or OSC.

4. refusing to obey an order that would require the individual to violate the law.

B. Elements Of A (b)(9) Violation. The elements of a (b)(9) violation are the same as those for a (b)(8) violation, except that in (b)(9) cases OSC must prove that protected conduct was a significant factor in a challenged personnel action, not merely a contributing factor. Warren, 804 F.2d at 656-58; Grant v. Dept. of Air Force, 61 M.S.P.R. 370, 377 (1994); Thornhill v. Dept. of Army, 50 M.S.P.R. 480, 490 (1991). Proving "significant" factor under (b)(9) is a higher burden than proving "contributing factor" under (b)(8). However, under (b)(9), like (b)(8), it is not necessary to show retaliation in establishing a violation, but only that the agency took the action because of the protected activity. Keenan v. United States Postal Service, 62 M.S.P.R. 307, 309, n.2 (1994).

C. Agency's Defense. The agency's defense in (b)(9) cases also differs from its defense in (b)(8) cases. An employer may defend against a prima facie case that it has taken an action because of conduct protected by (b)(9) by introducing preponderant evidence that it would have taken the same personnel action, even in the absence of protected activity. Thornhill, 50 M.S.P.R. at 490; Westmoreland v. Dept. of Treasury, 49 M.S.P.R. 574, 577 (1991). Thus, unlike a (b)(8) case, the employer need not prove its defense by clear and convincing evidence.

VIII. Key Statutes

A. Civil Service Reform Act of 1978 (P.L. 98-454).
B. Whistleblower Protection Act of 1989 (P.L. 101-12).
C. 1994 Office of Special Counsel Reauthorization Statute (P.L. 103-424).
D. Hatch Act Reform Amendments of 1993 (P.L. 103-94).
E. Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 (P.L. 103-353).
F. Legislative Branch Appropriations Act, 1997 (P.L. 104-197, § 315(b)(2)).

IX. ACCESS TO OSC.

A. Toll Free Numbers.

1. OSC Hotline	1-800-872-9855
2. Whistleblower Disclosure Unit	1-800-572-2249

3. Hatch Act Unit 1-800-85-HATCH

B. **Headquarters Address**

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

C. Field Office Addresses

U.S. Office of Special Counsel
San Francisco Bay Area Field Office
1301 Clay Street, Suite 365S
Oakland, CA 94612-5217

U.S. Office of Special Counsel
Dallas Field Office
1100 Commerce Street, Room 7C30
Dallas, TX 75242

D. World Wide Web: www.access.gpo.gov/osc

E. E-mail for Hatch Act Advisory Opinions: hatchact@osc.gov

effort to process them as expeditiously as possible--usually in order of receipt. Because of the high volume of calls that CEU receives, and because of our efforts to process complaints as expeditiously as possible, telephone calls are normally directed to the Examiner's voice mail. If you elect to leave a message, you should provide your name and case number, your daytime telephone number, and a brief explanation of the purpose of your call.

Examiners listen to all voice mail messages. Please be assured that--even if you do not receive a return call—your message will be received and considered. In addition, if you receive a pre-closure letter, you will be given the Examiner's name and telephone number, and an opportunity to make an appointment to speak with the Examiner by telephone.